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# IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

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## Economic, Social and Cultural Rights and WTO Work on Intellectual Property Rights - Current Processes and Opportunities

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1. The new international regime on Intellectual Property Rights administered by the World Trade Organization (WTO) is increasingly preoccupying the international human rights community. Indeed, the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement) contains provisions which, depending on how they are interpreted and implemented, can conflict with legally binding international human rights norms, in particular articles 2 (1) and (2), 11, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1] Of particular concern are the impacts of the TRIPs Agreement on the right to health (because it may restrict access to essential drugs at a low price), on indigenous rights (as traditional knowledge and community rights may be adversely affected by the requirement to provide some form of intellectual property protection on new plant varieties), and on the right to food (if plant varieties are patented it could restrict access to seeds and other agricultural products necessary for food production).

2. This paper seeks to analyse ways in which the Committee on Economic, Social and Cultural Rights (Committee) can usefully intervene in the current processes under way in the international trade arena relating to intellectual property, in order to ensure that trade rules or their implementation do not violate article 15 of the ICESCR or other rights of the Covenant that are affected by intellectual property law. This paper will argue that there is scope for the Committee and other human rights groups to intervene in a meaningful way in current WTO discussions on intellectual property, and to ensure that as they progress, these discussions take WTO members' commitments in the field of human rights into account. This paper will also argue that the Committee on Economic, Social and Cultural Rights is particularly well equipped to play the role of counterweight to WTO-mandated intellectual property protection obligations, for instance at the country level, through its process of examination of States' periodic reports.

3. To clarify what permits this conclusion to be reached, this paper will first set out what the WTO is and how it works. It will then describe the human rights-related intellectual property discussions currently under way in the WTO, and then highlight some ways the Committee might choose to pursue these issues.

## The WTO - what it is and how it works

### Background

4. The WTO was created in 1995 with the aim of ensuring predictability and stability in international trade, reducing existing barriers to trade and preventing new ones from developing, in order inter alia, "to raise standards of living and ensure full employment."[2] The WTO Preamble also recognizes the objective of sustainable development.

5. The term "WTO" may be used to refer to any of four distinct things: (1) the WTO Agreement, (2) the WTO as a multilateral "Member-driven" Organization, (3) the WTO Secretariat, and (4) the WTO Dispute Settlement Mechanism. This distinction is emphasized here as confusion or failure to distinguish between these four different aspects of the WTO often leads to misperception or misrepresentation of its structure, functions and power, and this in turn has led to erroneously directed policy action or recommendations.

6. **The WTO Agreement**: The term "WTO Agreement" is used to refer to the package of over 40 agreements and interpretative Understandings and Decisions that were adopted as a single undertaking at the conclusion of the "Uruguay Round" of multilateral trade negotiations, in 1994.[3] All members of the WTO are bound by all these agreements, which include the Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement).[4] The WTO's Dispute Settlement Mechanism applies to all of the agreements that make up the WTO Agreement.

7. **The WTO, the Organization**: As an organization, the WTO's functions are to oversee and facilitate implementation of the WTO Agreement. The WTO also serves as a forum for further multilateral trade negotiations, and administers the WTO's Dispute Settlement Mechanism. The WTO is a "Member-driven" organization, meaning that any policy decisions or initiatives come from its members, rather than the Secretariat. Also, all WTO members can participate in the WTO Councils and Committees.[5] There are no smaller "Executive Body"-type bodies in the WTO as there are in the United Nations - in other words, all WTO decisions are taken by all of its members. The Ministerial Conference, which meets at least every two years, is the WTO's Governing Body, setting strategic direction and making all final decisions. The WTO's General Council is the body responsible for overseeing the WTO's day-to-day business and management.[6]

8. One of the WTO's functions - overseeing and implementing the WTO Agreement - is carried out through the Trade Policy Review Mechanism (TPRM). The TPRM in some ways resembles human rights and other international supervisory mechanisms as it is based on reports that each WTO member must periodically submit describing its trade policies. The WTO Trade Policy Review is based on this report and on a report prepared by the WTO Secretariat. The TPRM's objective is to examine the impact of members' trade policies and practices on the trading system, and to contribute to improved adherence to WTO rules through greater transparency. The approach is not supposed to be legalistic, and consistency with WTO obligations is not the focus: rather, the focus is on transparency and the general impact of the trade policies, both on the country being examined and on its trading partners.[7]

9. **The WTO Secretariat**: The WTO's Secretariat in Geneva is relatively small, with a staff of 500, and a budget of 127 million Swiss Francs for 2000. The WTO Secretariat officially only provides administrative and technical support for the WTO and its members and does not have the power to propose new initiatives or policies, or to elaborate on existing rules - the member-driven nature of the WTO means that only WTO members can do so.

10. **The Dispute Settlement Mechanism**: One of the key features of the WTO is its Dispute Settlement Mechanism (DSM), which is today one of the most effective international judicial bodies. The DSM provides a binding dispute settlement procedure, and sets out clearly defined time limits for each stage of a dispute's adjudication. A three-person panel hands down decisions on disputes brought to the DSM. Either party to the dispute can then appeal the panel's ruling - appeals are heard by three of the WTO's seven-member standing Appellate Body. Importantly, the DSM allows the complainant WTO member(s) to impose trade sanctions (referred to as "compensation and suspension of concessions") against the member who has not complied with a dispute settlement ruling in the complainant's favour.[8]

**Criticisms**

11. The WTO has come under criticism, particularly by environmental, labour, and human rights groups, for three main reasons: the WTO is untransparent and undemocratic; the WTO favours trade objectives over social objectives such as environmental protection, public health or protection of human rights; and the WTO favours the powerful at the expense of the weak. All of these three criticisms have their validity, and human rights groups can play a significant role in addressing these especially if they do so with a full understanding of the WTO's political dynamics.

12. The Sub-Commission report on Globalisation and its Impact on the Full Enjoyment of Human Rights,[9] for instance, says that "the WTO has demonstrated particular opacity in the face of the demand for transparency". In the WTO context, a distinction is made between external and internal transparency. Internal transparency refers to the difficulties the economically weakest WTO members have in participating in WTO work as equals, often because developing country delegates have not been invited to key negotiating meetings or do not have the same information as their industrialized country counterparts. It was this lack of transparency and participation that was one of the key reasons given for the breakdown of talks at the WTO's Seattle Ministerial Conference, in December 1999.[10]

13. As regards external transparency, the WTO does indeed have a closed culture, far more so than other parts of the United Nations. Trade policy has traditionally been made behind closed doors, with information on country positions in international trade negotiations being fiercely guarded. Since civil society NGOs have until recently not sought to participate in any of the WTO's work or followed it closely, NGOs are on the whole an unknown quantity. And in this climate of lack of knowledge of NGOs' roles, many WTO delegates or secretariat staff are often not aware of the potential role of NGOs in providing information or policy advice,[11] or the nuances between different types of NGOs' positions or working methods.

14. Compounding this problem is the fact that the civil society NGOs who have been vocal and most visible in WTO discussions have been environmental or trade NGOs, advocating or supporting policies that either had hidden protectionist motives, or were perceived as having such motives. This is the case for instance of the environmental groups who have been saying that a country should be allowed to restrict imports of a product (shrimp, say) based on the way in which that product is produced. Many developing countries' delegates fear this as a way of limiting trade in products in which they have a competitive advantage, and are continuing to resist calls both for allowing distinctions between products based on their method of production, and for introducing new "linkage" issues such as environment and labour standards into the WTO. The resistance of developing countries to new, linkages issues should not be underestimated, and resistance to increased participation of NGOs in the WTO's work should be seen in this context.

15. Another illustration of the extreme sensitivity of the issue of opening the WTO's work to outside participants is the difficulty even intergovernmental organizations have in obtaining observer status with the WTO. This paper will not go into details about this, but it must be noted that the Secretariat of the Convention on Biological Diversity (CBD) has not been granted

observer status with the WTO TRIPs Council, and there is at present a stalemate in TRIPs Council regarding observer status for intergovernmental organizations. OPEC was also recently refused observer status with a WTO Committee.[12]

16. Despite the relatively closed nature of the WTO as compared to other international organizations, progress has been made in recent years. WTO documents are much more easily available, the Secretariat has set up a focal point specifically to deal with NGO relations, and it is now expected that panels and the Appellate Body will receive and consider non-governmental *amicus* briefs on cases which they have before them as a matter of course.[13] The issue of external transparency is on the WTO General Council's agenda and members themselves have called for steps to be taken to improve the WTO's image vis-à-vis the outside world. Moreover, the failure of the negotiations on an OECD Multilateral Agreement on Investment in 1998 has made many trade negotiators aware of the fact that it is now impossible to make trade policy behind closed doors and some Governments[14] have been taking steps to involve civil society groups in trade policy formulation at the national level.

17. There are two dimensions to the accusation that the WTO favours the powerful over the weak - on the one hand there is the issue of equity between different domestic interests (the United States pharmaceutical industry versus public health policy for instance), and on the other, the issue of international equity (large industrial countries versus small developing countries for instance). There is a significant body of literature on whether or not the WTO serves to increase the power of the strong over the weak, and this paper will not go into this point here. It will however question whether, if the WTO did not exist, there would be any requirement of transparency or limits to arbitrariness of international trade rules and policies, and whether there would be any forum to which the less powerful countries could take their grievances with regard to unfair international trade policies and practices.

18. Regarding equity between large, powerful (often corporate) interests and public interest considerations, as Audrey Chapman in her background paper before us today has pointed out "[i]ntellectual property laws are defined through closed, secretive international negotiations dominated by industry and are then brought to national legislatures as faits accomplis, without democratic deliberation".[15] The question for human rights and other public interest activists is: "to what extent does the WTO create or contribute to the problem?" and the next question is whether the question of inequity between the private interests of the powerful and public interests should be addressed at the international level, at the WTO - or rather at the domestic level.[16]

19. To conclude this succinct presentation of the WTO, the WTO may be part of a closed culture which traditionally favours corporate over public interests. However it is not a monolith and is capable of evolving and taking other concerns into account. Human Rights groups wanting to work towards ensuring that public interest concerns are taken into account by the WTO may find that the most appropriate place for raising their concerns is at the national level. But even at the international, WTO, level there is scope for raising public interest concerns, and such efforts may well meet with success, as long as they take the political dynamics and sensitivities found within the WTO into account and are directed to the appropriate part of the WTO.

20. The International Confederation of Free Trade Unions (ICFTU) has found a constructive way of bringing its concerns to the WTO and having them taken into account: it submits a report to the WTO Secretariat on labour conditions on countries due for their Trade Policy Review, in sufficient time for the issues it raises to be taken into consideration in preparation of the Secretariat report.[17] Other human rights groups - whether governmental or non-governmental - might find that following a similar course would be a useful way to bring their concerns and expertise to the attention of the WTO Secretariat and WTO members.

Intellectual property discussions currently under way in the WTO

21. This paper will not go into the content of the TRIPs agreement in any detail. It will nevertheless recall three points about the TRIPs agreement that are useful to bear in mind when thinking about TRIPs and international human rights obligations. First of all, the text of the agreement ("a widely arbitrated text put forward by the Chair of the negotiations as a Chair's text that he thought was a compromise"[18]) was a surprise to many developing country delegations, who felt it did not accurately reflect their positions. So why did they nevertheless accept it? The TRIPs agreement was one of a package of several international trade agreements adopted as a single undertaking, as the "WTO Agreement", in 1994. Thus, developing countries were prepared to accept rules ("disciplines" in WTO parlance) on intellectual property as a trade-off for concessions in other areas of interest to them, such as textiles and market access. Six years after the entry into force of the WTO Agreement, it is worth noting that the industrialized countries have been slow in implementing their obligations in the area of textiles, and in granting better market access for products of interest for developing countries. In addition, developing countries are facing major difficulties in implementing TRIPs - today it is estimated that over 60 developing country members of the WTO (out of a total of 139 WTO members) are in total non-compliance with TRIPs. These and related "implementation" issues are of central concern to developing country delegations to the WTO, and are the subject of discussion in special sessions of the WTO General Council, as discussed in more detail below.

22. Second, the TRIPs agreement is the first WTO agreement to prescribe minimum standards - previous multilateral trade agreements provided for concessions to be exchanged between members on a non-discriminatory and transparent basis.

23. Third, one of the points that comes up regularly in discussions about the conflicts between Human Rights and WTO rules is which body of law should prevail. One of the factors that has to be taken into account when undertaking a legal analysis of this sort is which is the most recent law (*lex posterior*), and some human rights advocates may feel discouraged at the fact that TRIPs is more recent than the International Covenant on Economic, Social and Cultural Rights. However, the TRIPs agreement does contain provisions that could limit its application in such a way as to harm human rights. These are to be found in its articles 7,[19] 8[20] and 27.2.[21]

24. Articles 7 and 8 of the TRIPs agreement are indeed one of the focuses of the different processes currently under way in the WTO regarding the TRIPs agreement.[22] These three processes are (1) the review of TRIPs article 27.3 (b); (2) the review of the implementation of the TRIPs agreement as a whole; (3) and the WTO General Council's special sessions on implementation concerns. These three processes are linked, and since all three have human rights implications they will be described below. It should also be noted that since there is no

agreement amongst WTO members as to whether or when there will be a new round of trade negotiations, there is a lack of momentum in the WTO in general, on all issues. Members are holding back on making clear negotiating proposals, waiting for a new round and the possibility this would provide for trade-offs between different members' interests.

25. **(1) 27.3 (b) Review**: Article 27.3 (b) of the TRIPs agreement says that a WTO member does not have to require patenting on life forms, except on micro-organisms and micro-biological and non-biological processes. Because of disagreements on the patenting of life forms and new plant varieties at the time of the adoption of the TRIPs agreement, a sentence was added to article 27.3 (b) providing that "[t]he provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement". That review did indeed begin in 1999, amongst disagreement on what the term "review" meant - many developing members of the WTO were of the view that it meant a review of the provisions of article 27.3 (b) itself, and allowed the possibility of amending the provision. Meanwhile some industrialized country members (the United States in particular) emphasized its view that "review" simply meant review of the implementation of the provision.

26. This review was scheduled to end in 1999, but amongst the disagreement between members as to the scope of the review and the collapse of the Seattle Ministerial Conference, it now finds itself in a kind of procedural limbo: the United States says that the review of article 27.3 (b) is over, whilst all other members believe it is ongoing. Meanwhile, there are differing views amongst members on the substance of the review: some countries would like to strengthen the patenting obligation and others would like to do away with it altogether. Some members have called for the article to be clarified or amended, for example to take account of traditional knowledge, community rights and biodiversity. India and other countries have for instance said that there is a serious problem of compatibility between TRIPs article 27.3 (b) and the Convention on Biological Diversity (CBD). Even Japan has noted that the TRIPs agreement is not suited to deal with the collective nature of traditional knowledge. Meanwhile, the United States and other industrialized countries say that there is no conflict between TRIPs and the CBD. The United States is refusing even to examine the relationship and it is in this context that it has objected to observer status for the CBD secretariat.

27. Given that any decision on article 27.3 (b) will have implications for plant variety protection and thus for indigenous knowledge, as well as for access to food because of the implications of patenting plant varieties and seeds,[23] the Committee on Economic, Social and Cultural Rights could find it interesting to intervene in these discussions, or keep abreast of developments and possibly raise related points in the examination of the periodic reports of relevant States parties to the Covenant.

28. **(2) TRIPs agreement review**: Meanwhile, the TRIPs Council is reviewing the TRIPs agreement according to article 71.1, which says that there will be a review of the whole agreement after the deadline for developing countries to implement it - i.e. 1 January 2000. This review is essentially a review of members' TRIPs implementing legislation, but given that TRIPs implementation is so difficult for developing countries, the TRIPs Council has had difficulties finding developing country candidates to undergo review. The TRIPs Council is meeting as we speak and the countries whose implementation it is reviewing include Turkey, Chile, Colombia, Estonia, Guatemala, Kuwait, Paraguay and Peru.[24]

29. Complicating issues is the fact that no one is quite sure what the current legal status is of the obligation on developing States to have implemented the TRIPs agreement by 1 January 2000. The reason this is unclear is linked to the lack of any decisions by the Seattle Ministerial Conference, which collapsed without agreement this time last year. The question of deadlines for implementation of several of the WTO agreements is under consideration at the WTO General Council special sessions on implementation concerns. In the meantime, however, the United States has made its view on the matter clear by bringing cases to the WTO Dispute Settlement Mechanism on the failure of two developing countries - Argentina and Brazil - to adopt TRIPs-consistent legislation by the 1 January 2000 deadline.[25]

30. **(3) General Council special sessions on implementation concerns**: One of the contentious issues in the lead-up to the Seattle Ministerial Conference (and one of the main reasons put forward for the collapse of the Ministerial) is the feeling of developing countries that their concerns were not being heard, both in terms of the process of the negotiations (see above) and the substance of the commitments they were being asked to make. During the Seattle preparatory process they were consistently calling for an assessment of the implementation of the existing WTO agreements to be made before introducing new issues onto the WTO's agenda.

31. Thus, after Seattle, the WTO established a special session of the General Council to review implementation, which has held four meetings in 2000. This implementation review is to address developing countries' concerns about imbalances in existing WTO agreements, as set out in the draft Seattle Ministerial Declaration, which called not only for changes in the implementation deadlines of several of the WTO agreements, but also for some of the provisions to be rewritten to make them more responsive to the needs of developing countries.

32. On the question of TRIPs, several - developing country - WTO members have called for a closer examination of articles 7 and 8 of the TRIPs agreement, arguing that there should be an assessment of the social, economic and welfare impacts of the agreement.

33. So far, however, discussions held in the implementation review have been mostly procedural and nothing has yet been decided.

Some possible avenues for action by human rights bodies

34. The above has pointed out that not only are there discussions under way in the WTO that open up questions at the intersection of the WTO intellectual property regime and human rights, but that there exist very real openings for the Committee on Economic, Social and Cultural Rights to intervene in these discussions on these questions today. This is all the more the case as the climate at the moment at the WTO is not one of negotiation (as it usually is, and as it will be as soon as a new trade round is launched, probably in late 2001), but rather one of reflection as members bide their time while waiting to decide whether and when a new round of multilateral trade talks will be launched.

35. To emphasize what Audrey Chapman points out in her background paper, unless human rights advocates seize this opportunity to provide an effective intellectual and organizational

counterweight to the forces of economic self-interest that naturally prevail in the WTO context, the intellectual property landscape will be reshaped in the years ahead without adequate consideration of the impact on human rights.

36. The Committee has been asked to clarify the relationship between intellectual property rights and human rights, including through the drafting of a general comment on this subject.[26] General discussions such as that held today are a step in this direction, and will contribute to a deeper understanding of the Covenant and how its intellectual property-related provisions are affected by WTO intellectual property rights regime, as well as to provide an opportunity to analyse in greater depth the nature and status of economic, social and cultural rights and the corresponding obligations of States parties to the Covenant.

37. **The key question then becomes: how to ensure that a better understanding of the relevant provisions of the Covenant on the part of the Committee and States parties can be effectively brought to the WTO's attention and reflected in the WTO's work and does not remain an interesting, but somewhat "theoretical" intellectual exercise?**

38. The Committee is in a unique position to bring human rights concerns to the attention of the WTO community, and this for five main reasons. First, its mandate is based on a legally binding international instrument, to which 143 States are parties. Of the 139 States currently members of the WTO, over 100 are also parties to the ICESCR, strengthening the Committee's role and giving legitimacy to any steps it might take to raise human rights concerns regarding the WTO's intellectual property regime. Second, a large proportion of the States parties to the ICESCR are developing countries, which can serve to reassure WTO members to whom ICESCR-related intellectual property concerns are brought that the mandate is not an industrialized country one, but a developing country one. Third, many developing countries are currently grappling with ways in which they can ensure that their concerns regarding the implementation of the WTO Agreement are taken into account. The ICESCR could provide a strong legal tool to assist them in this, and the Committee could work with trade delegates from developing countries to further explore this possibility. Fourth, the Committee's mandate asks for it to act both on a bilateral level, i.e. with individual States parties through examination of their periodic reports, and at the international level. Both these levels of action are necessary when seeking to intervene in WTO debates. Fifth, the experience the Committee has gained through the examination of State reports gives it added legitimacy when raising issues of concern with regard to the effects of the WTO intellectual property regime.

39. At the international level, the Committee on Economic, Social and Cultural Rights could seek to follow the work of the WTO on implementation issues as well as on the review of article 27.3 (b) and also feed into these processes, by offering information and expertise to the TRIPs Council or the General Council implementation review sessions. Beyond TRIPs issues, the Committee could also follow the lead of the International Confederation of Free Trade Unions and discuss with States parties whose reports it has examined the possibility of providing relevant information to the WTO Secretariat as it prepares the Secretariat report reviewing members' trade policies.

40. On an individual country level, the Committee could raise issues which it knows are sensitive in the WTO context in its discussions with individual States parties' representatives

when examining their periodic reports. Again to take an example from the background paper fo today's discussion, the Committee might want to, in the context of examination of States reports from States parties with high HIV/AIDS rates, ask whether these countries produce generic medicines, and whether their WTO and trade policy counterparts in the capital take into account the obligations under the Covenant when deciding policy on pharmaceuticals. The Committee could seek to explore with representatives of those countries the difficulties that trade policy ma pose to realization of the human rights embodied in the International Covenant on Economic, Social and Cultural Rights, and how human rights principles and norms might be applied to ensure that developing countries make the WTO's intellectual property regime work in their favour.

41. In conclusion, it should be recalled that at the end of the Second World War, when the international system that we know today was being set up, a three-pronged, triangular system was envisaged for international governance. The International Monetary Fund and the World Bank would cover financial governance, the planned International Trade Organization would cover trade issues and ECOSOC would have the role of ensuring that social concerns would be reflected. Sadly, ECOSOC has never played this role, and as we know, financial and trade forces have tended to be stronger than social and public interest ones. Now it is within the reach of the Committee on Economic, Social and Cultural Rights, backed up by a legally-binding international treaty - the International Covenant on Economic, Social and Cultural Rights - to which over 140 States are parties, to step in and play the role envisaged for ECOSOC over 50 years ago.

## Notes

[1] Many examples of such clashes or potential clashes have been given elsewhere, see for instance Geoff Tansey, Trade, Intellectual Property, Food and Biodiversity (1999), on the web at <www.zen.co.uk/home/page/g.tansey/trips.html>, Graham Dutfield, "Can the TRIPs Agreement Protect Biological and Cultural Diversity?" (1997) or Rene Loewenson, *Essential Drugs in Southern Africa Need Protection from Public Health Safeguards Under TRIPs*, 4 Bridges Between Trade and Sustainable Development (September 2000) on the web at <www.ictsd.org/html/arct_sd.htm#Bridges>; UNDP Human Development Report 1999, and Human Development Report 2000; Lord Sydney Templeman, *Intellectual Property*, 1 Journal of International Economic Law, pp. 603-606 (1998).

[2] Preamble, Marrakesh Agreement Establishing the World Trade Organization.

[3] The full list of agreements which makes up the WTO Agreement can be found on the web at: <www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement>

[4] Other parts of the WTO Agreement include the General Agreement on Tariffs and Trade (GATT) 1994, the Agreement on Agriculture and the General Agreement on Trade in Services. There are also four "plurilateral" agreements which are binding only on some of the WTO's members.

[8] Although on paper all countries are entitled to participate in all WTO meetings, many small or developing countries have in fact frequently been excluded from informal but key negotiating sessions, as discussed below.

[9] For more information on the functioning of the WTO, see <www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm>. See also Bernard M. Hoekman and Michel M. Kostecki, The Political Economy of the World Trading System - From GATT to WTO, Oxford: Oxford University Press, 1995.

[7] All WTO members' trade policies are reviewed, the frequency of each country's review varying according to its share of world trade. Canada, Liechtenstein and Switzerland are due for review in December 2000. For more details as well as the list of countries to be reviewed in 2001, see <www.wto.org/english/tratop_e/tpr_e/tpr_e.htm>.

[8] For more details on the functioning of the WTO's Dispute Settlement Mechanism, see Robert Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years (1998).

[9] Preliminary report submitted by J. Oloko-Onyango and Deepika Udagama, E/CN.4/Sub.2/2000/13, 15 June 2000.

[10] See for instance *Agreement on Ministerial Declaration Eluding Negotiators Before Seattle*, BRIDGES Weekly Trade News Digest, Vol. 3, No. 45, 15 November, 1999, on the web via <www.newsbulletin.org/bulletins/WhichBulletin.cfm?Bulletin_ID=14&SID=>.

[11] In the words of a well-known and respected GATT/WTO commentator, John Jackson: "So far there seems to be no general explicit rules regarding a role for NGOs in various WTO activities. This has been a source of strong criticism of the WTO, particularly by environmental groups who argue that NGOs can bring important expertise and information to bear on the WTO." See John H. Jackson, The World Trade Organization - Constitution and Jurisprudence, (1998).

[12] The international organizations with observer status with the WTO General Council are the United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), International Monetary Fund (IMF), World Bank, Food and Agricultural Organization (FAO), World Intellectual Property Organization (WIPO), Organisation for Economic Co-operation and Development (OECD). Other organizations have observer status in one or other of the other WTO councils and committees.

[13] Although this question still elicits controversy, see Chakravarthi Raghavan *Trade: Will AB listen to "strong signal" from General Council?* South-North Development Monitor (SUNS), 22 November 2000.

[14] See for instance, Stephen J. Kobrin, *The MAI and the Clash of Globalisations*, Foreign Policy Fall, 1998, at p. 99.

[15] Audrey R. Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)*, Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, 3 October 2000.

[16] It is worth noting that bilateral agreements between the United States and other countries often require stricter intellectual property protection than that mandated by the TRIPs agreement often referred to as "TRIPs plus".

[17] The ICFTU reports to the WTO's Trade Policy Review Mechanism are available on the web via <www.icftu.org>

[18] *SUNS* 2000.

[19] Article 7 of the TRIPs agreement, entitled "Objectives" reads: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technical knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[20] Article 8 of the TRIPs agreement, entitled "Principles" reads: "1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

[21] Article 27.2 reads: "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

[22] It is however important to note in this context, that the WTO's Dispute Settlement Mechanism has been criticized for "failing to interpret the TRIPs Agreement in a manner that does justice to the delicate balance of social and economic interests reflected in the stated purposes of that Agreement", particularly for not giving due weight to articles 7, 8 and 27.1. See Robert Howse, *The Canadian Generic Medicines Panel, A Dangerous Precedent in Dangerous Times*, 3 Journal of World Intellectual Property (July 2000), at 506.

[23] See Geoff Tansey and Graham Dutfield, note 2 above.

[24] The list of those whose legislation will be examined at the next TRIPs Council is public and can be obtained from the WTO Secretariat.

[25] See *BRAZIL - MEASURES AFFECTING PATENT PROTECTION, Request for Consultations by the United States* WT/DS199/1, 8 June 2000, and *ARGENTINA - CERTAIN MEASURES ON THE PROTECTION OF PATENTS AND TEST DATA Request for Consultations by the United States*, WT/DS196/1, 6 June 2000, on the Web via: <www.wto.org/ddf/ep/search.html>

[26] By the Sub-Commission in its resolution *Intellectual Property Rights and Human Rights*, of August 2000, E/CN.4/Sub.2/Res/2000/7.

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